No. 05-56202

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EZEQUIEL NUNEZ CORNEJO,
Plaintiff-Appellant,

v.

COUNTY OF SAN DIEGO; CITY OF SAN DIEGO; CITY OF ESCONDIDO; THE CITY OF OCEANSIDE; PAUL LACROIS; WILLIAM MCDANIEL, California Deputy Sheriff; JON MONTION; DOES 1-100; CITY OF CARLSBAD,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF OF THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF DEFENDANTS-APPELLEES

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INTERESTS OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517 and Federal Rule of Appellate Procedure 29(a), the United States files this brief as amicus curiae in support of affirmance.

The United States wishes to emphasize at the outset that our Government firmly believes in and supports consistent adherence to the Vienna Convention on Consular Relations. The consular notification provisions at issue in this appeal are very important, and serve as a significant protection to U.S. nationals who reside

or travel abroad. Our Government also places high importance on compliance by federal, state, and local officials with the Convention, and regularly advises those officials of their obligations under Article 36.

Nevertheless, the district court correctly dismissed the plaintiff's claims, because the Vienna Convention does not create judicially enforceable individual rights, but was intended to be enforced through the usual means of diplomatic negotiation and political intercession. Even if the Convention did create certain enforceable individual rights, furthermore, the appropriate mechanism for enforcing those rights would not be a private suit for money damages. Nothing in the Convention creates such an unprecedented remedy, nor has Congress expressed any intent to implement the Convention in this manner. Although the plaintiff invokes 42 U.S.C. § 1983, Article 36 does not create any "rights" within the meaning of that provision, nor is the Vienna Convention encompassed within § 1983's reference to the "Constitution and laws."

The United States has a substantial interest in the interpretation and effect that domestic courts give to international instruments to which our government is a party. Furthermore, permitting enforcement of the Vienna Convention's consular notification provision through private tort actions could have significant ramifications for law enforcement operations in this country. Accordingly, the United States files this brief as amicus curiae to set out the government's views

regarding the appropriate construction and application of the Convention and 42 U.S.C. § 1983.

STATEMENT OF THE ISSUE PRESENTED

Whether a foreign national may sue state or local law enforcement officials for money damages based on their alleged failure to provide consular notification information pursuant to the Vienna Convention on Consular Relations.

STATEMENT

1. The Vienna Convention on Consular Relations governs "consular relations, privileges and immunities" between signatory States. Vienna Convention, preamble. The Convention expressly states that it is intended to promote "friendly relations among nations," and that the privileges and immunities it confers are "to ensure the efficient performance of functions by consular posts on behalf of their respective States" — but "not to benefit individuals." *Id.* Consular functions recognized under the Convention include "protecting * * * the interests of the sending State and of its nationals"; "helping and assisting nationals * * * of the sending State"; and "representing or arranging appropriate representation for nationals of the sending State." Art. 5.

Article 36 of the Vienna Convention governs communications between a foreign consulate and that country's nationals. In relevant part, the Article

provides that, "[w]ith a view to facilitating the exercise of consular functions relating to nationals of the sending State," consular officers will be free to communicate with and have access to their own nationals, and those nationals will be free to communicate with and have access to consular officials. ¶ 1(a). Article 36 directs receiving state officials to inform consular officials, at the request of a foreign national, that the national has been arrested or taken into custody, and also to "inform the person concerned without delay of his rights" to have his consular officials notified and to have access to those officials. ¶ 1(b). Finally, Article 36 provides consular officials "the right to visit a national of the sending State who is in prison, custody, or detention, to converse and correspond with him and to arrange for his legal representation." ¶ 1(c).

2. Ezequiel Nunez Cornejo is a Mexican national who was arrested by San Diego County deputy sheriffs on December 15, 2004. He subsequently pleaded guilty to marijuana transportation, possession of a firearm and methamphetamines, and driving under the influence of drugs. Cornejo brought this civil suit for money damages against several city and county governments, as well as numerous individual law enforcement officials. In relevant part, Cornejo alleges that he was not informed of his right under the Vienna Convention to contact a consular representative, and that the outcome of his case would have been different had he been so notified. First Amended Complaint, ¶ 8.

The district court dismissed Cornejo's claims. In holding that the Vienna Convention does not provide for a private right of action, the district court emphasized that "[n]o circuit court has accepted the proposition * * * that the Vienna Convention creates private rights of action and corresponding remedies," and deferred to "the longstanding view of the U.S. State Department that 'the only remedies for failure of consular notification under the Vienna Convention are diplomatic, political,'" or state-to-state. Order, at 4-6.

On appeal, Cornejo again asserts that the Vienna Convention creates individual rights that are judicially enforceable in a private suit for money damages. App. Br., at 7-10.[1]

ARGUMENT

I. ARTICLE 36 OF THE VIENNA CONVENTION DOES NOT CREATE JUDICIALLY ENFORCEABLE INDIVIDUAL RIGHTS.

A. The Vienna Convention was negotiated and adopted against an understanding that violations are typically "the subject of international negotiations and reclamation," not judicial redress. *Head Money Cases*, 112 U.S.

[1] This appeal was stayed pending *Sanchez-Llamas v. Oregon*, 126 S. Ct. 1457 (2006), which presented the question whether the Vienna Convention creates judicially enforceable individual rights. *Sanchez-Llamas* did not decide that question, instead holding that any rights were subject to procedural default and that the exclusionary rule was not an appropriate remedy for a violation of the Convention.

580, 598 (1884). In construing an international treaty, a court should be "mindful that it is in the nature of a contract between nations." *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 533 (1987) (citation and internal quotation marks omitted). Although it is possible for a treaty to create judicially enforceable private rights, such treaties are the exception rather than the rule, and must overcome a presumption that enforcement will be exclusively through political and diplomatic channels. *See, e.g., United States v. Emuegbunam*, 268 F.3d 377, 389-390 (6th Cir. 2001), *cert. denied*, 535 U.S. 977 (2002); *United States v. Jimenez-Nava*, 243 F.3d 192, 195-196 (5th Cir.), *cert. denied*, 533 U.S. 962 (2001); *United States v. De La Pava*, 268 F.3d 157, 164 (2d Cir. 2001); *Garza v. Lappin*, 253 F.3d 918, 924 (7th Cir.), *cert. denied*, 533 U.S. 924 (2001).

This background principle applies even when a treaty benefits private individuals. *See* Restatement (Third) of Foreign Relations Law of United States, § 907 cmt. a (1987). Thus, in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), the Supreme Court held that treaty language specifying that a merchant ship "shall be compensated for any loss or damage" and that a "belligerent shall indemnify the damage caused by its violation" of treaty provisions did not confer enforceable individual rights. *Id.* at 442 & n.10 (citations omitted). The Court explained that the treaties "only set forth

substantive rules of conduct and state that compensation shall be paid for certain wrongs," but do not "create private rights of action for foreign corporations to recover compensation from foreign states in United States courts." *Id.* at 442.

Similarly, Article 36 of the Vienna Convention may benefit a detained foreign national, but does not give that individual a right to sue to enforce the Convention's requirement that detained foreign nationals be notified of their right to contact a consular representative for assistance. *See, e.g., Jimenez-Nava*, 243 F.3d at 195-198 (Article 36 does not create judicially enforceable individual rights); *Emuegbunam*, 268 F.3d at 391-394 (same); *see also De La Pava*, 268 F.3d at 163-165; *United States v. Li*, 206 F.3d 56, 66-68 (1st Cir.) (Selya, J., and Boudin, J., concurring), *cert. denied*, 531 U.S. 956 (2000).[2]

B. The text and structure of the Vienna Convention, as well as the history of its drafting, ratification, and implementation, support the conclusion that it was not intended to create individually enforceable rights.

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[2] We are aware of only one court of appeals that has held that the Vienna Convention's consular notification provision is enforceable in court through a private lawsuit for money damages. *See Jogi v. Voges*, 425 F.3d 367 (7th Cir. 2005). The United States believes that the panel decision in *Jogi* is erroneous, and has submitted two briefs as amicus curiae in support of a pending petition for rehearing or rehearing en banc. Tellingly, the primary rationale in *Jogi* for recognizing an individual claim for money damages — that the drafters of the Convention must have intended *some* means of judicial enforcement, *see id.* at 385 — was questioned by the Supreme Court in *Sanchez-Llamas,* 126 S. Ct. at 2681.

The Supreme Court has held that, in order for a federal statute to create enforceable private rights, "its text must be phrased in terms of the person benefitted." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) (quotation marks and citation omitted). The Convention, however, explicitly provides that the privileges and immunities it confers are "*not to benefit individuals*." Vienna Convention, preamble (emphasis added). Although this specific limitation refers to "privileges and immunities," it reflects the broader point that the entire treaty, including Article 36, is intended to enhance the ability of States to protect their nationals abroad rather than to create freestanding individual rights. The "right[s]" explicitly conferred on consular officials by Article 36 plainly are not intended to benefit or create rights in individual officials, and the fact that Article 36 confers parallel "rights" upon detained foreign nationals does not show that those nationals may sue in the courts of the receiving State to enforce the Convention. Rather, both "rights" are for the same purpose: to "facilitat[e] the exercise of consular functions." Article 36, ¶ 1. *Cf. Pennhurst State Sch. v. Halderman*, 451 U.S. 1, 18-19 (1981) (statutory reference to disabled individuals' "right to appropriate treatment, services, and habilitation" did not create enforceable private rights).

Furthermore, even if the term "rights" in Article 36 manifested an intent to create enforceable individual rights, that fact would not assist Cornejo, who

alleges that the defendants violated Article 36 by failing to inform his of the opportunity "to contact the consular officials of his country, Mexico." App. Br., at 3; *see also* Amended Complaint ¶ 7(a). The only "right[s]" of a foreign national to which Article 36 refers are the right to have a consular representative notified by law enforcement officials that a foreign national has been detained, and the right to have communications from the detainee to his consular post forwarded by law enforcement officials without delay. Art. 36(b). The provision governing law enforcement officials' obligation to inform a detainee that he can contact consular representatives for assistance uses different terminology altogether.

Crucially, there is no indication in the Convention's text that the "rights" referred to in Article 36(1)(b) may be privately enforced. *See Gonzaga Univ.*, 536 U.S. at 283-284 (holding that federal statute may support a claim under § 1983 only if Congress intended for the statute to create enforceable private rights). Rather, the remedies for violations of that provision are the traditional means by which international disputes are resolved. A foreign national's government may protest the failure to observe the terms of Article 36 and attempt to negotiate a solution. If diplomatic channels fail to provide a satisfactory resolution, the Optional Protocol establishes a mechanism that States may choose for resolving disputes. The United States is not a party to the Optional Protocol, having noticed its withdrawal in March 2005. Under the Protocol, furthermore, only a State may

initiate a proceeding before the ICJ, and the ICJ's ruling "has no binding force except between the parties and in respect to the particular case." Statute of the ICJ, art. 59, 59 Stat. 1062. The fact that the only remedy created by the drafters of the Vienna Convention is this limited and purely voluntary one, to be invoked only by a State, is inconsistent with any argument that the Convention created judicially enforceable individual rights. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120-122 (2005).

Nor is any intent to create privately enforceable rights manifest in Article 36's provision that rights of consular access "shall be exercised in conformity with [domestic law], subject to the proviso * * * that [domestic law] must enable full effect to be given to the purposes for which the rights * * * are intended." The provision refers to how rights "shall be *exercised*," *i.e.*, how rights will be implemented in practice in situations where they apply, such as how and when detainees will be notified of the right to contact a consular representative, how consular officers will be informed if the detainee requests ("exercises" his right), and how consular officers can exercise the right of visitation. The means by which any rights will be "exercised" under the Convention does not speak to the available *remedies* if those rights are violated or not afforded. If a person sues for damages a police officer who has violated his First Amendment rights, the person is not exercising his First Amendment rights when bringing the lawsuit; he is

suing to remedy a prior interference with the exercise of his rights. Notably, the Supreme Court in *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006), rejected the argument that the "full effect" provision in Article 36 barred application of procedural default rules. *Id.* at 2681. The Court also expressed "doubt" that the Convention requires a "judicial remedy of *some* kind," and noted that "diplomatic avenues" were the "primary means of enforcing the Convention." *Id.* at 2680-2682.

The structure and functioning of Article 36 of the Convention confirm that it does not create any enforceable private rights in a detained foreign national. The first protection extended under the Article is to consular officials, who "shall be free to communicate with nationals of the sending State and to have access to them." The "rights" of foreign nationals were deliberately placed underneath, 1 U.N. Official Records 333 (Chilean delegate), signaling what the introductory clause spells out — that the function of Article 36 is not to create freestanding individual rights, but to facilitate a foreign State's ability to protect its nationals. As a practical matter, a foreign national's rights are necessarily subordinate to, and derivative of, his country's rights. An individual may ask for consular assistance, but it is entirely up to the sending State whether to provide it. Significantly, neither a foreign State nor its consular official can sue under the Vienna Convention to remedy an alleged violation nor bring an action under 42 U.S.C.

§ 1983 for damages and injunctive relief. *See Breard v. Greene*, 523 U.S. 371, 378 (1998). It follows that an individual alien should not be able to do so either.

The drafting history of Article 36 of the Vienna Convention also shows that it was not intended to create privately enforceable rights. An initial draft of the Convention was prepared by the International Law Commission, the members of which recognized that the proposed article on consular notification "related to the basic function of the consul to protect his nationals vis-a-vis the local authorities," and that "[t]o regard the question as one involving primarily human rights or the status of aliens would be to confuse the issue." ILC, Summary Records of 535th Meeting, U.N. Doc. A/CN.4/SR.535, at 48-49 (1960) (Sir. Gerald Fitzmaurice); *see also id.* (Mr. Erim agreed "that the proposed new article * * * dealt with the rights and duties of consuls and not with the protection of human rights or the status of aliens"). Significantly, the ILC drafters observed that the consular notification provision would be subject to the "normal rule" of enforcement under which a country that "did not carry out a provision" of the Convention would "be estopped from invoking that provision against other participating countries." *Id.* at 49.

The final ILC draft of the proposed convention submitted to the United Nations Conference did not require law enforcement officials to notify detained foreign nationals that they could contact a consular representative, but instead

required notification of consular representatives whenever a foreign national was detained. *See* ILC, Draft Articles on Consular Relations, With Commentaries 112 (1961), available at http://untreaty.un.org/ilc/texts/9_2.htm. Following numerous delegates' expression of concern that requiring mandatory notice to consular officials would impose a significant burden on receiving States, particularly those with large tourist or immigrant populations, *see* 1 Official Records, United Nations Conference on Consular Relations, Vienna, 4 Mar. - 22 Apr. 1963, at 36-38, 82-83, 81-86, 336-340 (1963), the Conference adopted a compromise proposal that required notice to consular representatives at the foreign detainee's request. *Id.* at 82. The purpose of the change was not to enshrine in the Convention an individual right for the detainee, but "to lessen the burden on the authorities of receiving States." *Id.* Given the circumstances in which it was added and the stated purpose for its inclusion, the notification provision cannot reasonably be interpreted to create enforceable private rights.

The history of the Vienna Convention's consideration and ratification by the United States Senate and its post-ratification implementation by the Executive Branch provide further evidence that the Convention was not understood to create new private rights within our domestic legal system. The only inference that can be drawn from that history is that the Convention was understood to be "self-executing," *i.e.*, to impose legal obligations on U.S. officials without the need for

implementing legislation. As with federal legislation, the fact that the Convention imposes a legal constraint on official conduct does not establish that it creates enforceable private rights. *See Gonzaga Univ.*, 536 U.S. at 283-284; *see also* Restatement (Third) of Foreign Relations Law of United States § 111, cmt. h (1987) (noting that whether a treaty is "self-executing" is different from whether treaty creates enforceable private rights).

At the time of ratification, the State Department and the Senate Foreign Relations Committee agreed that the Vienna Convention would not modify existing law. *See* S. Exec. Rep. No. 9, 91st Cong., 1st Sess., at 2, 18 (1969). The State Department also noted that disputes under the Vienna Convention "would probably be resolved through diplomatic channels" or, "[f]ailing resolution," potentially through the processes set out in the Optional Protocol. *Id.* at 19. Consistent with the understanding that the Vienna Convention does not create free-standing individual rights, the State Department's longstanding practice has been to respond to foreign States' complaints about violations of Article 36's notification requirements by investigating those complaints and, where a violation has occurred, making a formal apology to that country's government and taking steps to lessen the likelihood of a recurrence of the problem. *See Li*, 206 F.3d at 65.

C. To the extent that the text, structure, and history of the Vienna Convention do not definitively answer the question whether Article 36 creates individual rights, any ambiguity should be resolved in favor of the Executive Branch's construction of the treaty.

In matters of foreign affairs, our Constitution vests the responsibility for speaking on behalf of the nation in the Executive Branch: "There is an elaborate regime of practices and institutions by which the United States and other nations enforce" treaty commitments, with nations sometimes choosing to forego enforcement "for reasons of prudence,* * * convenience, or *** to secure advantage in unrelated matters." *Li*, 206 F.3d at 68. For a U.S. court to inject itself into this delicate process, by asserting the right to adjudge and remedy treaty violations, could cause significant harm to our foreign relations.

The Executive Branch has construed the Vienna Convention not to provide for judicial enforcement in habeas corpus or other equitable actions brought by private individuals and foreign governmental officials. *See, e.g.,* Brief for United States at 11-30, *Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669 (2006) (Nos. 05-51, 04-10566); Brief for United States at 18-30, *Medellin v. Dretke*, 544 U.S. 660 (2005) (No. 04-5928); Brief for United States at 18-23, *Republic of Paraguay v. Gilmore*, 523 U.S. 1068 (1998) (No. 97-1390), and *Breard v. Greene*, 523 U.S. 371 (1998) (No. 97-8214). We have also described the State Department's

practices relating to the Vienna Convention, which demonstrate that the Convention was not understood to create judicially enforceable individual rights.

The Executive's longstanding interpretation of the Convention "is entitled to great weight." *United States v. Stuart*, 489 U.S. 353, 369 (1989) (citation and quotation marks omitted); *see also El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 168-169 (1999). Given that the Executive's construction is supported by the text, structure, and history of the Convention, as well as its history of implementation both in this country and worldwide, this Court should defer to that position and affirm the district court's ruling that the Convention does not create judicially enforceable individual rights.[3]

II. ANY RIGHTS CREATED BY ARTICLE 36 OF THE VIENNA CONVENTION ARE NOT ENFORCEABLE IN A PRIVATE CIVIL ACTION FOR MONEY DAMAGES.

Even assuming that the Vienna Convention creates an individual right to contact a consular representative and to be notified of the opportunity to do so,

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[3] Nothing in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), undercuts the conclusion that Article 36 of the Vienna Convention does not create judicially enforceable individual rights. Although one of the issues litigated in *Hamdan* was whether the 1949 Geneva Convention confers privately enforceable rights, the Court chose not to resolve the issue, and assumed that the 1949 Geneva Convention does not, of its own force, "furnish[] petitioner with any enforceable right." *Id.* at 2794. Instead, the Court held that Congress specifically incorporated the 1949 Geneva Convention as a limitation on the President's authority, through Article 21 of the Uniform Code of Military Justice. *See id.*

there is no basis to hold that those rights are enforceable in a private civil action for retrospective money damages.

A. The Vienna Convention itself does not create a private right of action for damages for violation of Article 36's consular notification requirements. Nothing in the text of the Convention or its drafting history suggests that it was intended to be enforced in this manner. To the contrary, the fact that the drafters of the Convention found it necessary to create an optional mechanism for resolving disputes suggests strongly that the Convention did not create a private right of action. *Cf. Abrams*, 544 U.S. at 121-123.[4]

The fact that a private damages remedy would be a highly unusual method of enforcing a treaty weighs heavily against interpreting the Convention as implicitly creating such a remedy. In *Sanchez-Llamas*, the Supreme Court emphasized the unlikelihood that Convention signatories would have intended to require a remedy — there, application of an exclusionary rule in criminal proceedings — that had been rejected under most countries' domestic law. 126 S. Ct. at 2678. Similarly, the State Department is unaware of any State that provides

[4] Although, as noted (at pp. 13-14, *supra*), the history of Senate consideration of the Convention demonstrates that it was understood to impose legal obligations on U.S. officials without the need for implementing legislation, this fact does not show, or even suggest, that the Convention created a private right of action for money damages.

for enforcement of Article 36 of the Convention through private suits for money damages. *Cf. Stuart*, 489 U.S. at 366 (relying on "subsequent operation" of treaty as evidence of its intended scope). Absent clear evidence that the Convention was intended to create a private money damages remedy, a court should decline to hold that it did so *sub silentio.*

B. Congress did not create a private right of action under 42 U.S.C. § 1983 to vindicate rights asserted under Article 36 of the Vienna Convention. The private right of action created by § 1983 is limited to the deprivation under state law of "rights, privileges, or immunities secured by the Constitution or laws." The treaty-based interests that Cornejo seeks to vindicate are not within the "rights" encompassed by § 1983, nor are they "secured by the Constitution and laws" within the meaning of that statute.

1. As the Supreme Court held in *Gonzaga University v. Doe*, only "an unambiguously conferred right [will] support a cause of action brought under § 1983." 536 U.S. at 283. Even where Congress legislates for the benefit of an identified class, the statute cannot be the basis for a private claim under 42 U.S.C. § 1983 unless Congress clearly intended for it to create individually enforceable federal rights. *See Abrams*, 544 U.S. at 120-122. This inquiry whether federal law creates enforceable private rights should be guided by the analysis whether the law creates an implied right of action. *See Gonzaga Univ.*, 536 U.S. at 284.

We have already explained that Article 36 of the Vienna Convention does not create any judicially enforceable individual rights. That analysis also bars any attempt to enforce the provision through an action brought under 42 U.S.C. § 1983. *See Abrams*, 544 U.S. at 120-122.

Furthermore, the fact that the rights asserted in this case are based on an international treaty, rather than a federal statute, should make the Court particularly reluctant to construe Article 36 of the Vienna Convention to create private rights enforceable under 42 U.S.C. § 1983. International treaties are entered into by the Executive and ratified by the Senate against the background understanding that they will not be privately enforceable. Additionally, international treaties are not the product of bicameral legislation, and private rights enforceable under 42 U.S.C. § 1983 must typically be created by Congress. *See Save Our Valley v. Sound Transit*, 335 F.3d 932, 937-938 (9th Cir. 2003). With the sole exception of the Seventh Circuit's recent decision in *Jogi*, *see* n. 2, *supra*, we are not aware of another instance in which a federal court of appeals has recognized a claim under 42 U.S.C. § 1983 seeking to enforce an international treaty. Given the absence of clear evidence that Article 36 was intended to create private rights that would be enforceable under 42 U.S.C. § 1983, this Court should decline to recognize such a claim.

2. Article 36 of the Vienna Convention is not within the "Constitution and laws" that can secure rights, the deprivation of which is actionable under 42 U.S.C. § 1983. At best, the textual reference to "laws" is ambiguous about whether it includes international treaties, and the available evidence of Congress' intent as well as general interpretive principles weigh heavily against that construction of the statute.[5]

Section 1983 derives from § 1 of the Ku Klux Klan Act of 1871, establishing and conferring federal jurisdiction over a private right of action to vindicate the deprivation, under color of state law, of "any rights, privileges, or immunities secured by the Constitution of the United States." Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13. In 1874, following a multi-year effort to "simplify, organize, and consolidate all federal statutes of a general and permanent nature," Congress enacted the Revised Statutes of 1874. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 624 (1979) (Powell, J., concurring). In relevant part, the revised statutes divided the original provision of the 1871 Act into one

[5] As we next explain, the conclusion that the phrase "Constitution and laws" as used in 42 U.S.C. § 1983 does not include treaties is based on the specific text, history, and context of Section 1 of the Ku Klux Klan Act of 1871, now codified in relevant part at 42 U.S.C. § 1983. This analysis does not imply that the Executive Branch generally construes the term "laws" to exclude treaties. In some contexts, Congress' use of the word can reasonably be interpreted to encompass treaties.

remedial section and two jurisdictional sections. *See Maine v. Thiboutot*, 448 U.S. 1, 6-7 (1980); *Chapman*, 441 U.S. at 627-628.

The remedial provision enacted as part of the revised statutes in 1874, and now codified at 42 U.S.C. § 1983, created a private right of action for the deprivation of "any rights, privileges, or immunities secured by the Constitution and laws." *See Maine*, 448 U.S. at 6-7 (describing history); *Chapman*, 441 U.S. at 624. The Supreme Court has recognized that, notwithstanding statements in the legislative history that the adoption of the revised statutes was not intended to make substantive changes, the inclusion of "and laws" broadened the right of action created by that provision to include claims seeking to vindicate certain individual rights protected by federal statutes. *See Maine*, 448 U.S. at 4-5; *cf. Chapman*, 441 U.S. at 625-626, 627-644 (Powell, J., concurring).

There is no indication, however, that in enacting the revised statutes *in toto* in 1874 Congress intended to create a new private remedy for treaty violations (which, as we have explained, do not generally afford judicially enforceable private rights). The plain language of the provision — which refers to the vindication of rights protected by "the Constitution and laws," rather than by the "Constitution, the Laws of the United States, and Treaties," U.S. Const., art. III, § 2 — does not show that it was intended to encompass claims arising under international treaties. Nor does the underlying purpose for the provision:

Congress' "prime focus" in enacting the Ku Klux Klan Act and other Reconstruction-era civil rights laws was to "ensur[e] a right of action to enforce the protections of the Fourteenth Amendment and the federal laws enacted pursuant thereto." *Chapman*, 441 U.S. at 611. The Supreme Court cautioned in *Chapman* that a court should be "hesitant," in interpreting the jurisdictional provisions that were adopted as part of the statutory codification of the Ku Klux Klan Act, to construe them to encompass "new claims which do not clearly fit within the terms of the statute." *Id.* at 612. That concern is particularly acute in the context of recognizing a private right of action to enforce a provision of an international treaty.

Other historical evidence supports the conclusion that the term "laws" in 42 U.S.C.§ 1983 was not intended to refer to an international treaty such as the Vienna Convention. Just one year after enacting the revised statutes adding that term, Congress enacted a statute giving circuit courts original jurisdiction in certain categories of cases, including civil claims above the jurisdictional amount and "arising under the Constitution or laws of the United States, or treaties made." Act of Mar. 3, 1875, ch. 137, 18 Stat. 470. The clear implication is that the term "laws" as used in both statutes does not include treaties.

Similarly, the Habeas Corpus Act of 1867 extended the federal habeas power to "all cases where any person may be restrained of his or her liberty in

violation of the constitution or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. Once again, the distinction between this text and the text of § 1983 supports the conclusion that "laws" in § 1983 does not include treaties. The distinction between the two provisions also supports the notion that Congress might have intended to provide for judicial review, through the specific equitable remedy of habeas corpus, of confinement alleged to be in violation of a treaty (assuming that the treaty created enforceable individual rights), but not to provide the full panoply of equitable and legal relief under § 1983 for any treaty violation, no matter how minor the resulting harm.

In contrast to these broadly-worded statutory provisions, the provision of the 1874 revised statutes that codified the jurisdictional grant to district courts in § 1 of the Ku Klux Klan Act (now codified at 28 U.S.C. § 1343(a)(3)), conferred jurisdiction over civil actions to redress the deprivation of rights secured "by the Constitution of the United States, or * * * by any law providing for equal rights." *See Thiboutot*, 448 U.S. at 15-16 (describing history). Although the Supreme Court has acknowledged that this provision is narrower than a plain-language reading of § 1983, *see id.* at 20-21, Congress' use of this construction in the jurisdictional provision weighs against reading the parallel remedial provision in 42 U.S.C. § 1983 to have a wholly different, and significantly broader, scope, that does *not* follow from a plain-language reading of the phrase "and laws."

These historic provisions have been repeatedly amended and recodified since their original enactment, yet Congress has chosen not to change the differences in wording among the various statutes. Both the general federal-question statute, 28 U.S.C. § 1331, and the federal habeas statute, 28 U.S.C. § 2241, continue to include the "Constitution," "laws," and "treaties" as among the sources of rights that can be invoked under those provisions. In contrast, 42 U.S.C. § 1983 continues to refer only to rights secured by the "Constitution and laws." This Court should decline to read 42 U.S.C. § 1983 so as to render those textual differences a nullity.[6]

The Supreme Court has not addressed the question whether an international treaty is one of the "laws" that secures rights that can be vindicated under § 1983. However, the Court has rejected an expansive interpretation of § 1983, describing the cause of action created as vindicating rights under "the United States Constitution and federal statutes that it describes." *Baker v. McCollan*, 443 U.S. 137, 145 n.3 (1979). Consistent with this construction, the Supreme Court has

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[6] Furthermore, decisions interpreting and applying the federal habeas statute have held that only treaties conferring enforceable individual rights fall within its scope. *See, e.g., Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005), *rev'd on other grounds*, 126 S. Ct. 2749 (2006); *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *Wang v. Ashcroft*, 320 F.3d 130, 140 (2d Cir. 2003). There certainly would be no basis for reading § 1983 more broadly, to permit a cause of action to enforce a treaty provision that was not intended to create privately enforceable rights.

held that § 1983 does not encompass claims arising under common or "general" law, *see Bowman v. Chicago N.W. Ry. Co.*, 115 U.S. 611 (1885), or claims arising out of rights or privileges conferred by state law. *See Baker*, 443 U.S. at 142-144; *Carter v. Greenhow*, 114 U.S. 317 (1885).[7]

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[7] In *Baldwin v. Franks*, 120 U.S. 678 (1887), the Supreme Court held that the forcible removal of Chinese nationals from their homes and businesses in violation of a treaty between the United States and China did not constitute a crime under federal statutes prohibiting conspiracies to forcibly "prevent, hinder, or delay the execution of any law of the United States," and "to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the United States." *Id.* at 662-663, 693-694. In reaching that conclusion, the Court assumed that the treaty could constitute a "law" within the meaning of the statutes, *id.* at 693-694, 661-662 — a point that the petitioner had not challenged in his brief to the Court. *See Baldwin v. Franks*, 120 U.S. 678, Brief of Petitioner in Error, in Transcript of Record (filed Apr. 18, 1886). The Court's assumption that the term "laws" as used in certain criminal civil-rights statutes included treaties, which was made under different operative statutes and without an analysis of their text and history, does not support an interpretation of the unexplained addition of the term "and laws" in the *civil* remedy under § 1983 to encompass violations of international treaties. In the criminal context, the exercise of prosecutorial discretion can safeguard against harmful applications of the statute, which could interfere with our foreign relations or the State Department's implementation of treaty obligations. The private civil remedy created by 42 U.S.C. § 1983, in contrast, contains no such safeguard — weighing against a broad construction of the statutory cause of action it creates. *Cf. Central Bank v. First Interstate Bank*, 511 U.S. 164, 190-191 (1994) (refusing to interpret criminal aiding-and-abetting liability as evidence of Congress' intent to impose civil aiding-and-abetting liability). In the criminal context, furthermore, the United States Government can provide an authoritative interpretation of an international treaty, taking into account foreign policy and other considerations. When a private party sues under § 1983, the United States is not a party to the litigation, and may not be before the court to offer its construction of a treaty or international agreement.

Indeed, even in the context of treaties between the United States Government and Indian tribes, this Court has questioned whether claims seeking to vindicate rights to tribal self-government and to take fish are cognizable under 42 U.S.C. § 1983, because they are "grounded in treaties, as opposed to specific federal statutes or the Constitution." *Hoopa Valley Tribe v. Nevins*, 881 F.2d 657, 662 (9th Cir. 1989), *cert. denied*, 494 U.S. 1055 (1990).[8] Even if treaties with Indian tribes were encompassed by § 1983's reference to "laws," furthermore, that would not mean that Congress intended for international treaties to be covered by the statute. The United States Government has a "unique obligation toward the Indians," *Morton v. Mancari*, 417 U.S. 535, 555 (1974), which warrants in some circumstances more favorable treatment than is afforded to others. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675-676 (1979); *State of Minnesota v. Hitchcock*, 185 U.S. 373, 396 (1902). Furthermore, the Indians have a federal common-law right to sue to vindicate aboriginal rights, which dates back to the adoption of the Constitution.

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[8] Subsequent decisions of this Court have left open the possibility that some claims seeking to vindicate rights protected under Indian treaties might be within the ambit of § 1983. *See, e.g., Skokomish Indian Tribe v. United States*, 410 F.3d 506, 515 (9th Cir. 2005) (*en banc*); *United States v. Washington*, 935 F.2d 1059, 1061 (9th Cir. 1991). It is unnecessary to decide the question for purposes of this case, however. As we next explain, there are compelling reasons for treating Indian treaties and international treaties differently, in determining the proper scope of the private right of action created by § 1983.

See Oneida County v. Oneida Indian Nation, 470 U.S. 226, 234-236 (1985). And Indian tribes, as dependent sovereigns, have no recourse against the United States under public international law or through diplomatic means to redress violations of Indian treaties.

International treaties, in contrast, are adopted with a background presumption against judicial enforcement, *see* pp. 5-6, *supra*, which protects the prerogatives of the Executive in the conduct of foreign affairs. As the Supreme Court explained in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004), the potential foreign-policy implications of permitting private rights of action to enforce international law "should make courts particularly wary" of recognizing claims of this sort. *Cf. Gonzaga Univ.*, 536 U.S. at 291 (Breyer, J., concurring) (noting that no "single legal formula" can govern the "ultimate question" whether Congress intended for private individuals to have a cause of action under § 1983).

It seems particularly implausible that Congress would have intended to include international treaties within the "laws" enforceable in a private damages suit under 42 U.S.C. § 1983, because that would have had the effect of giving foreign nationals greater rights under treaties to which the United States is a party than are conferred upon United States citizens. This Court should be reluctant in the absence of clear Congressional intent "to impose judicially such a drastic remedy, not imposed by any other signatory to this convention," and thus to

"promote disharmony in the interpretation of an international agreement." *United States v. Chaparro-Alcantara*, 226 F.3d 616, 622 (7th Cir.), *cert. denied*, 531 U.S. 1026 (2000).

Finally, even if some treaties could fall within the "laws" that create rights enforceable under 42 U.S.C. § 1983, this Court should decline to recognize such a cause of action to enforce Article 36 of the Vienna Convention. Where Congress creates a specific statutory remedy for the vindication of a federal right, that is "ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983." *Abrams*, 544 U.S. at 121. A court should be particularly willing to find displacement of a § 1983 remedy in the area of foreign affairs. *Cf. Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942) (recognizing that courts are more likely to find federal preemption when Congress legislates "in a field that touche[s] international relations" than in an area of traditional police power); *Dames & Moore v. Regan*, 453 U.S. 654, 679 (1981) (recognizing President's authority to renounce or extinguish claims of U.S. nationals against foreign governments). Here, the Senate gave its advice and consent to the Convention and to the Optional Protocol, which set out a specific remedial scheme.[9] The existence of explicit government-

[9] While the Executive Branch subsequently exercised its authority to withdraw (continued...)

to-government remedies under the Optional Protocol should bar recognition of a suit under § 1983.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court.

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[9](...continued)
from the Protocol, no affirmative action by Congress was required to effect that withdrawal.

CERTIFICATE OF COMPLIANCE

I hereby certified that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,816 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I hereby certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared with Word Perfect 12 in a proportional typeface with 14 characters per inch in Times New Roman.

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief Of The United States As Amicus Curiae In Support Of Defendants-Appellees were served on the following counsel by overnight delivery, postage prepaid, on October 13, 2006:

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